

IN THE
Supreme Court Of The United States

October Term, 1995

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC.,
RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE,
RITA MATHIS, ROGER ASTERINO, AND H.O.M.E., INC.,
Petitioners,

v.

THE CITY OF CINCINNATI,
EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER,
THOMAS E. BRINKMAN, JR., AND ALBERT MOORE,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

Supplemental Brief for Petitioners

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief in support of the petition for *certiorari* in this case pursuant to Supreme Court Rule 15.8. Because the outcome of this case is squarely determined by this Court's decision in *Romer v. Evans*, No. 94-1039 (May 20, 1996), and nothing remains to be decided on the merits, petitioners suggest that the proper disposition of this petition is to grant *certiorari*, reverse the decision below and remand the case for further proceedings.

The questions presented in this case are the same as those presented in *Romer*. In *Romer*, the Court has now affirmed the judgment of the Colorado Supreme Court and definitively held that Amendment 2 violates the Equal Protection Clause. The *Romer* holding requires reversal of the ruling below because the Sixth Circuit rejected an identical challenge to Issue 3, the municipal charter amendment which mirrors Amendment 2 and was adopted by the voters in Cincinnati in 1993. Like Amendment 2, Issue 3 "make[s] a general pronouncement that gays and lesbians shall not have any particular protections from the law." Slip op. at 13.

In *Romer*, the Court has held that these measures do not "bear a rational relationship to a legitimate governmental purpose," slip op. at 13-14, because they "identif[y] persons by a single trait and then den[y] them protection across the board," *id.* at 11. Because of the sweeping nature of these measures, the court in *Romer* drew the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 13. This holding directly resolves the second question presented for review in this case: "Whether such a city charter amendment violates the Equal Protection Clause even under the Court's standard of rational basis review where it gives effect to private prejudice and does not rationally further any legitimate governmental interest?"

The *Romer* decision thus definitively resolves the dispute between the parties in this case. Here, after a trial, the District Court issued a permanent injunction against Issue 3 because it failed rational basis review. See Pet. App. 68-76a. The Sixth Circuit reversed, *id.* at 19a-21a, concluding that Issue 3

satisfied rational basis review. In *Romer*, the Court has now rejected the analysis that led to this holding below. Although the Court could simply grant *certiorari*, vacate the ruling below, and remand for further proceedings not inconsistent with *Romer*, there is no purpose to be served by a *vacatur* as there is nothing left for decision on the merits. The Court already has held that measures such as Issue 3 represent "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." Slip op. at 14.

One of the respondents has previously suggested that this case is distinguishable from *Romer* because Issue 3 is a local rather than statewide measure. ERNSR Resp. at 16. This argument is untenable in view of the Court's broad holding in *Romer* that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that *government and each of its parts* remain open on impartial terms to all who seek its assistance." Slip op. at 12 (emphasis added). See also Pet. Reply at 2-3. If it is unconstitutional for a state to implement a measure such as Amendment 2, it cannot be constitutional for a city, acting upon authority conferred by a state, see, e.g. Ohio Const. art. XVIII (municipal powers), to do the very same thing.

CONCLUSION

Based on the Court's decision in *Romer v. Evans*, No. 94-1039 (May 20, 1996), petitioners request that the Court grant *certiorari*, reverse the decision below and remand the case for further proceedings. Alternatively, petitioners request that the Court grant *certiorari*, vacate the decision below, and remand the case for further proceedings not inconsistent with *Romer*.

Respectfully submitted,

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